Case No. 45953-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SANDRA CABAGE

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; PNC MORTGAGE, a division of PNC BANK, N.A.; and DOE DEFENDANTS 1 through 20

Respondents.

RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S OPENING BRIEF

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I. STATEMENT OF THE CASE

A. Factual History.

On March 6, 2006, Appellant Sandra Cabage ("Cabage") executed a promissory note ("Note") in the amount of $212,000, payable to National City Mortgage, a division of National City Bank. CP 339-343.

Cabage secured repayment of the Note with a recorded deed of trust (the "Deed of Trust") which encumbered real property located in Pierce County (the "Property"). CP 344-358.

In April of 2009, Cabage could no longer make the required mortgage payments. CP 650, ¶ 1. On November 20, 2009, Cabage filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. CP 513-517. In her schedules, Cabage listed National City Mortgage as the secured creditor with respect to the loan. CP 527.[1]

On February 5, 2010, PNC Bank, National Association ("PNC") moved for relief from the bankruptcy stay, stating that it was the

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[1] PNC is the successor by merger to National City. CP 648, ¶ 1; *see also PNC Bank, N.A. v. Smith*, 2014 WL 907277 (E.D. Cal. Mar. 6, 2014) *report and recommendation adopted*, 2014 WL 2548536 (E.D. Cal. June 5, 2014); *Sidorenko v. Nat'l City Mortgage Co.*, 2012 WL 3877749 (W.D. Wash. Sept. 6, 2012) ("[a]t the end of 2009, National City merged with and into Defendant PNC Bank. The Court takes judicial notice of the merger as it is a matter of public record.").

"continuing holder of the Note." CP 557-561. On March 8, 2010, the bankruptcy court granted PNC's motion, permitting PNC to "pursue its state remedies to enforce its security interest...." CP 563-564.

On or about June 18, 2010, as a result of Cabage's admitted default on the secured loan, Northwest Trustee Services, Inc. ("NWTS") sent a Notice of Default to Cabage. CP 365-367.

On or about June 25, 2010, PNC executed a sworn declaration (the "beneficiary declaration") stating that it was the actual holder of the Note. CP 368.

On July 7, 2010, an Appointment of Successor Trustee, vesting NWTS with the powers of the original trustee, was recorded with the Pierce County Auditor. CP 369-70.

On July 22, 2010, a Notice of Trustee's Sale was recorded with the Pierce County Auditor, setting a sale date of October 29, 2010. CP 371-374. However, that sale did not occur. CP 402-403.

On November 8, 2011, another Notice of Trustee's Sale was recorded with the Pierce County Auditor, setting a sale date of February 10, 2012. CP 375-378. This sale was postponed and ultimately did not take place. CP 404. NWTS subsequently discontinued the non-judicial foreclosure with respect to the Property. *Id.*

B. Procedural History.

On June 4, 2012, Cabage filed a Complaint against NWTS, PNC, and "Doe Defendants 1 through 20." CP 1-20. On November 5, 2012, PNC filed a counterclaim for judicial foreclosure. CP 186-258.

On January 24, 2014, the trial court granted summary judgment to all Defendants. CP 1613-1616. On January 31, 2014, the trial court also entered a Non-Recourse Judgment and Decree of Foreclosure against Cabage. CP 1617-1622. This appeal followed.

II. RESPONSE TO APPELLANT'S STATEMENT OF ISSUES

1. The trial court did not err in finding that Cabage failed to prove a CPA violation against NWTS because she could not establish that NWTS caused her injury.

2. The trial court did not err in finding that Cabage failed to prove DTA violations and her Misrepresentation claim against NWTS because she had no damages resulting from NWTS' actions.

3. The trial court's memorandum opinion correctly held that Cabage did not possess either injury or damages.

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III. RESPONSE ARGUMENT

A. The Trial Court's Grant of Summary Judgment to NWTS Should be Affirmed.

1. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, this Court may *affirm* the ruling below *on any ground* supported in the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), *citing LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991). With the motion, a trial court can consider "supporting affidavits and other admissible evidence based on personal knowledge." *Id.*

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue for trial. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."). A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co.*, *supra.* at 395, *citing Blakely v. Housing Auth. of King Cy.*, 8 Wn. App. 204, 505 P.2d 151, *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow*, 53 Wn.2d 639, 335 P.2d 825 (1959); *see also Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id.*, *citing Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988); *see also Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989).

Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend,* 118 Wn.2d 476, 824 P.2d 483 (1992); *Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982).

Here, Cabage failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment, and the trial court's order should be affirmed for the reasons set forth below.

2. Cabage's Claim of DTA Violations.

a. The Note Holder is the Beneficiary.

Cabage conveniently ignores the well-reasoned Division One decision in *Trujillo v. NWTS*, 2014 WL 2453092, Slip Opin. No. 70592-0-I (Jun. 2, 2014), instead relegating it to a footnote while asking for this Court to "reject" its analysis. Brief of Appellant at 15, n. 5.

To the contrary, this Court should fully embrace *Trujillo*, which is consistent with the Supreme Court's holding in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). *Trujillo* eliminates Cabage's arguments regarding ownership of the Note, and establishes that NWTS was entitled to rely on a beneficiary declaration stating that PNC was the Note holder. *Trujillo* also supports NWTS' position on its

compliance with statutory duties, such as acting in good faith and issuing certain foreclosure notices.

Trujillo specifically notes that "the holder of a note *could also* be its owner at the same time." *Trujillo*, *supra*. at *7 (emphasis added), *citing John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969). But Cabage's argument that "the 'beneficiary' *must also* be the 'owner' of the Note" is legally erroneous. Brief of Appellant at 13 (emphasis added). As Division One finds, based on an examination of longstanding Washington case law, "we must conclude that the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note." *Trujillo*, *supra*. at *8. Thus, an "investor's" ownership interest in the subject Note is, in the words of *Trujillo*, "irrelevant." *Id.* at *10; *cf.* Brief of Appellant at 9.

If there is negotiation of a note, or if the note remains held by the original payee, that holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment, *e.g.*, a deed of trust. *See Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 565 P.2d 812 (1977); *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872). If the borrower defaults on the note, a secured party may exercise its rights under a deed of trust with respect to any property securing such obligation.

See, e.g., RCW 62A.9A-203(g), RCW 62A.9A-308(e).

In this case, despite her contentions on appeal, Cabage has repeatedly recognized that PNC was the beneficiary entitled to modify the Note's terms, as well as entitled to enforce the secured Note through foreclosure. *See* CP 573, 19:16-20[2]; CP 577, 23:12-16[3]; CP 578, 27:5-8[4]; CP 593, 53:11-13.[5] Cabage does not even have standing to assert challenges to the loan's securitization and claim otherwise. *See Ogorsolka v. Residential Credit Solutions, Inc. et al.*, 2014 WL 2860742 (W.D. Wash. Jun. 23, 2014), *citing Zhong v. Qual. Loan Serv. Corp.*, 2013 WL 5530583 (W.D. Wash. Oct. 7, 2013); *see also Brodie v. NWTS*, 2012 WL 6192723 (E.D. Wash. Dec. 12, 2012) *aff'd*, 2014 WL 2750123 (9th Cir. June 18, 2014).

b. Cabage Cannot Claim Pre-Sale Damages Under the DTA.

While a borrower in Washington has always been permitted to allege a DTA violation in order to obtain injunctive relief under RCW 61.24.130, nothing in the DTA provides for a pre-sale damages remedy

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[2] Cabage understood that PNC succeeded National City and she should contact them with any questions.
[3] Cabage contacted PNC to ask for a loan modification.
[4] Cabage owed $233,000 to PNC when Notice of Default issued.
[5] "Q. Why did you think you should be working with PNC to cure the default? A. Because that is who I had my loan with."

besides the expressly-created *per se* CPA remedy in RCW 61.24.135, which is inapplicable here.[6] *See Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 247, 62 L. Ed. 2d 146 (1979).[7]

The absence of a pre-sale damages claim is supported by the DTA's core goals, one of which is to give borrowers "an adequate opportunity... to *prevent* wrongful foreclosure." *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683, 686 (1985) (emphasis added). This prevention can be accomplished through injunctive relief – on *any* ground – and an appropriate tender. RCW 61.24.030(8)(j); RCW 61.24.040(1)(f)(IX); RCW 61.24.130(1).[8] But no Washington court has ever proscribed that the DTA's goals include a pre-sale *damages* claim. *See CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007) (sole

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[6] The question of whether the DTA contemplates a pre-sale damages claim is currently pending before the Washington Supreme Court in *Frias v. Asset Foreclosure Services, Inc. et al.*, Case No. 89343-8, pursuant to certified questions from the United States District Court for the Western District of Washington. The certification lists ten Western District judges who have all agreed that *no* pre-sale DTA damages claim exists. *See* 13-00760-MJP, Dkt. 48 (W.D. Wash. Sept. 25, 2013).

[7] ("It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")

[8] The DTA broadly allows "recourse to the courts *pursuant to RCW 61.24.130* to contest the alleged default on any proper ground." RCW 61.24.030(8)(j) (emphasis added); *see also* RCW 61.24.040(2) (sale notice must notify borrower of right to initiate action to "prevent or restrain the sale.")

method to contest sale is to restrain it); *In re Marriage of Kaseburg*, 126 Wn. App. 546, 108 P.3d 1278 (2005).

A remedy is not the same as a claim; defaulting borrowers can assert pre-sale *claims* for alleged DTA violations, but the DTA expressly lists the *remedies* available to injunctive relief before a sale or damages after a sale. *Compare* RCW 61.24.127, RCW 61.24.130.[9] The purpose of RCW 61.24.127(1) is to ensure that, even if a borrower waives the right to contest the sale beforehand, he or she can still bring an action later to seek compensation for the loss of equity caused by a *completed* wrongful foreclosure. *See* Joseph L. Hoffman, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323, 337 (Apr. 1984). NWTS should not be liable for damages where no completed sale occurred.

c. NWTS Adhered to the DTA.

Even if a pre-sale DTA-based damages claim exists, it would be defined as the "[f]ailure of the trustee to *materially* comply with the

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[9] There are some exceptions where pre-sale monetary damages are allowed. *See* RCW 61.24.090(2) (borrower can recover unreasonable fees imposed as a "condition to reinstatement."); RCW 61.24.135 (right to sue under the CPA for specified DTA violations). A borrower can also bring non-DTA claims. *See, e.g., Bingham v. Lechner*, 111 Wn. App. 118, 45 P.3d 562 (2002) (usury statute); *Cox v. Helenius, supra.* (negligence action).

provisions of this chapter [i.e. the DTA]." RCW 61.24.127(1)(c) (emphasis added); *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 311, 308 P.3d 716 (2013).[10]

A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) recording a Notice of Trustee's Sale (RCW 61.24.040), and 4) delivery and recording a Trustee's Deed to the purchaser at sale (RCW 61.24.050). Here, NWTS followed all material steps under the DTA, and received all required declarations; the trial court accurately found that it was not liable for any violation of the law.

i. A Borrower Must be Prejudiced by Non-Compliance With the DTA.

It is settled law in Washington that a borrower must show prejudice from actual material defects in foreclosure notices. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005); *Steward v. Good,* 51 Wn. App. 509, 515, 754 P.2d 150 (1988) (noting a "requirement that prejudice be established" where a

[10] Raising a broad challenge to the beneficiary's identity does not fall under this limited type of claim.

"'technical violation' of the DTA occurs and finding that there [was] no showing of harm to the debtor"); *see also Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 581 n.4, 276 P.3d 1277 (2012) (Stephens, J., concurring).

The Washington Supreme Court has held because of the DTA's anti-deficiency provision – providing that after a nonjudicial foreclosure, a borrower is absolved of any further liability on the Note, even if the foreclosure is wrongful – that where, as here, the borrower is in default and cannot cure, the borrower is economically indifferent to any defects in the foreclosure process and cannot suffer prejudice. *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that wrongful foreclosure should be vacated).

Although the DTA "must be construed in favor of borrowers," a wrongful foreclosure where the borrower admits default and cannot cure "does not injure the borrower's interests, because the debt secured by the trustee's deed is per se satisfied by the foreclosure sale due to the Act's anti-deficiency provision." *Id.* (citations omitted). The DTA is a strictly construed statute, but not a strict-liability statute. Prejudice is still required to demonstrate a violation.

For example, in *Koegel v. Prudential Mut. Sav. Bank*, Division

One declined to invalidate a sale where a plaintiff identified "technical, formal error[s], non-prejudicial, and correctable." 51 Wn. App. 108, 113, 752 P.2d 385 (1988).

In *Koegel*, the Notice of Default erroneously contained an "additional description of a plot that had been conveyed and was no longer part of the transaction." *Id.* at 110. Further, the Notice of Trustee's Sale "was sent only 25 days after the corrected notice of default," which is contrary to RCW 61.24.030. *Id.* at 111. The Court stated: "[t]his is not to say, however, that the strict compliance requirement eliminates any consideration of prejudice before a sale may be set aside." *Id.* at 112.[11]

Based on this reasoning, *Koegel* found that:

> [a]ppellant's contentions that he was prejudiced by this lapse are disingenuous. The notice of default listed the loan which was in arrears. From that information, appellant would be on notice that the property offered as collateral for that loan would be in jeopardy of foreclosure. The purpose of the notice of default is to notify the debtor of the amount he owes and that he is in default. In fact, the notice of default properly listed the amount of arrears and noted

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[11] The Court added:

> Appellant was aware of the technical defects in the notices of default. Nonetheless, appellant neither provided U.S. Trustee with documentation of the precise errors alleged, nor acted to restrain the sale. In fact, the trustee granted appellant a series of continuances.... The continuances alone would ameliorate any harm appellant suffered by having 5 fewer days' notice between the notice of default and notice of sale than required by RCW 61.24.030(6).

Id. at 112. Nothing in today's version of the DTA alters this necessity of showing prejudice in order to challenge a foreclosure.

> the deed of trust that was subject to foreclosure. That deed would also have put appellant on notice as to which property was in jeopardy.

Id. at 112.

Thus, even where technical errors exist, a foreclosure may proceed in the absence of prejudice.[12]

ii. An Assignment of Deed of Trust is Not Germane to the Propriety of Foreclosure.

Nowhere in the DTA does the word "assignment" appear. The purpose of an Assignment of Deed of Trust "is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property." *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102 (W.D. Wash. 2011), *citing* RCW 65.08.070. In fact, "an Assignment of a deed of trust... is valid between the parties whether or not the assignment is ever recorded.... Recording of the assignments is

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[12] In *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), the Ninth Circuit Court of Appeals lists several examples of actionable prejudice. *Cervantes* at 1043, *citing Ed Peters Jewelry Co. v. C & J Jewelry Co., Inc.*, 124 F.3d 252, 263, n. 8 (1st Cir.1997). For instance, if a sale notice alleged that the sale would take place on a Friday, but instead it took place the day before, such information would materially violate the DTA and prejudice the borrower. *See* RCW 61.24.040(5). Or, if a notice informed the borrower that he or she could reinstate the loan up to five days prior to the sale, when the DTA instead requires reinstatement eleven days prior to sale; that would also materially violate the DTA and prejudice the borrower. *See* RCW 61.24.090.

for the benefit of the parties." *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1987).[13]

But even if the Assignment mentioned in this case was somehow relevant to the foreclosure process, as Cabage believes, it did not involve NWTS. CP 364; *cf.* Brief of Appellant at 8.[14] No liability should accrue to NWTS because of the Assignment's existence or recordation.

iii. The Beneficiary Declaration was Proper.

The DTA requires a trustee to have "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). One possible means of accomplishing this requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." *Id.* Moreover, "[u]nless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is *entitled to rely on the beneficiary's declaration as evidence of proof*

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[13] *See also Williams v. Wells Fargo Bank, N.A.*, 2012 WL 72727 (W.D. Wash. Jan. 10, 2012); *Fed. Nat. Mortg. Ass'n v. Wages*, 2011 WL 5138724 (W.D. Wash. Oct. 28, 2011); *St. John v. NWTS*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011) ("Washington State does not require recording of such transfers and assignments.").

[14] Cabage also does not have standing to attack the Assignment. *See, e.g.*, *Brodie, supra.*; *Ukpoma v. U.S. Bank, N.A.*, 2013 WL 1934172 (E.D. Wash. May 9, 2013); *Salmon v. Bank of Am. Corp.*, 2011 WL 2174554 (E.D. Wash. May 25, 2011).

required under this subsection." RCW 61.24.030(7)(b) (emphasis added).

Trujillo speaks directly to the validity of a beneficiary declaration *identical in form the one in this case*, and NWTS' proper reliance on it. 2014 WL 2453092, *5 ("Absent conflicting evidence, the declaration should be taken as true.... We conclude that Wells Fargo, which states under penalty of perjury, that it is the holder of the note, has provided proof that it is the 'beneficiary' of the deed of trust securing the delinquent note for purposes of this statute.").

Decidedly ignoring this key similarity, Cabage concludes that the presence of language concerning the "requisite authority" to enforce the obligation is fatal to the declaration. Brief of Appellant 15. But the declaration's averment does not set forth a blanket reliance on the UCC; rather, it is specifically limited to *requisite* authority under RCW 62A.3-301.[15]

Trujillo plainly refutes a federal district court decision that "held that the beneficiary declaration in that case was deficient because it relied on RCW 62A.3–301 to show authority to enforce the note." 2014 WL 2453092, *10, *citing Beaton v. JPMorgan Chase Bank N.A.*, WL 1282225

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[15] In fact, the Beneficiary Declaration at issue explicitly states in its header: "*Note Holder*" (Executed by Officer of Beneficiary). CP 358.

(W.D. Wash. Mar. 26, 2013). *Trujillo* finds that "the *Beaton* court... misread RCW 62A.3–301 as an impediment to proof of the right to enforce a note." *Id.*; *see also Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014) ("The reference to RCW 62A.3-301 is not to the contrary, as that statutory section merely defines who is entitled to enforce the relevant promissory note.").[16]

Although Cabage argues that NWTS "knew" the beneficiary declaration "did not comply with the requirements of the DTA," she is mistaken because the declaration fully comports with RCW 61.24.030(7)(a) and the *Bain* interpretation of who can be a beneficiary. *Cf.* Brief of Appellant at 15, 34.[17]

iv. NWTS Was Entitled to Rely on the Beneficiary Declaration.

Cabage also seeks to undermine NWTS' reliance on the beneficiary declaration by claiming that NWTS engaged in "clear violations of the duty of good faith...." Brief of Appellant at 36, *citing*

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[16] Division One also mentions that *Bain* cuts against the view expressed in *Beaton* and *Pavino v. Bank of Am., N.A.*, 2011 WL 834146 (W.D. Wash. Mar. 4, 2011). *Id.* As such, Cabage's position has been disavowed.

[17] Additionally, state law does not mandate that a borrower such as Cabage should receive a copy of the Beneficiary Declaration, nor is it publicly-recorded. It is inconceivable that one can be prejudiced or injured from something never seen, received, or relied upon.

RCW 61.24.010(4). Because it is circular reasoning for NWTS' reliance on the declaration to create the very lack of good faith that would lead to an inability to rely on the same document, Cabage must demonstrate some *other* basis upon which NWTS violated its statutory duty.

Yet, Cabage is simply unable to articulate what NWTS actually *did* to cease acting in good faith. As *Trujillo* notes, while cases like *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), and *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013), discuss a trustee's duties, they do not substantiate a violation of them absent supporting facts. 2014 WL 2453092, *13.

The record below is just as devoid of evidence against NWTS as Cabage's briefing. Cabage admits that she had a single conversation with NWTS, during which she was provided with *useful, accurate information*:

> Q. [W]as there any individual employee of Northwest Trustee who participated in your mediation with PNC?
> A. Not that I recall.
> Q. Did you have any conversations with Northwest Trustee concerning your mediation with PNC?
> A. No.
> Q. What communications other than notices received at the property did you have with Northwest Trustee?
> A. I called Northwest Trustee at one point when I was trying to modify my loan because I wasn't receiving any information or responses from PNC, and called to talk to somebody there and they gave me PNC's phone number.
> [...]

Q. Other than giving you PNC's contact information or telling you that the foreclosure was on hold, is there anything else that Northwest Trustee or its employees told you?
A. No, I don't believe so.
Q. When Northwest Trustee gave you the contact information for PNC, did you question that or say, why are you asking me to call PNC?
A. No.

CP 440, 97:9-21, CP 441, 99:4-12; *see also* CP 442, 101:2-21.

Unlike the trustee in *Klem* who ignored the borrower's attempts at communication, and proceeded to sale anyway, NWTS acted in a manner that satisfied its good faith obligation – even ultimately discontinuing the entire non-judicial process. CP 404, ¶ 7. Consequently, the result in *Trujillo* is equally applicable here, *i.e.*, Cabage "fails to substantiate that there was any breach of any duty by NWTS under RCW 61.24.010(4). Accordingly, NWTS was entitled to rely on this... declaration, as the plain words of the statute provide." 2014 WL 2453092, *14.

v. NWTS Was Not Required to Issue a Second Notice of Default.

Cabage also ascribes liability to NWTS for not serving her with a "new Notice of Default." Brief of Appellant at 10. This argument fails, however, for a number of reasons.

First, the DTA does not mandate that a new Notice of Default must

ever be issued after the one required under RCW 61.24.030(8). The *only* temporal requirement is that a Notice of Default must pre-date the Notice of Sale by at least thirty days, and contain certain information. RCW 61.24.030(8). Cabage recognizes this fact ("the DTA does not require the issuance of the new Notice of Default..."), but nevertheless conjectures re-issuance "should have been done" anyway. Brief of Appellant at 10.

Second, a change in the sums owing is not a basis upon which a new Notice of Default must be provided. *Id.* In *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, the foreclosing creditor added requirements to cure an existing default; Division One found that the DTA "does not explicitly include or exclude a requirement that the notices of default and sale issued after the bankruptcy mirror those before the bankruptcy." 80 Wn. App. 655, 672, 910 P.2d 1308 (1996); *rev. denied*, 130 Wn.2d 1015 (1996). *Meyers Way* focused on the fact that only a new Notice of Sale was mandated post-bankruptcy, and rejected the argument that the foreclosure process should have been reinitiated due to a change in the amount necessary to cure a loan's arrearage. *Id.*[18]

Third, the circumstances of *Watson v. NWTS*, Slip Opin. No.

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[18] In her deposition, Cabage agreed that her default was ongoing, and she did not pay any amounts listed in the Notice of Default because of her discharge. CP 432, 40:1-12.

69352-2-I, 321 P.3d 262 (2014), are distinguishable from Cabage's foreclosure. *Cf.* Brief of Appellant at 10. *Watson* addresses whether a new declaration of compliance with pre-foreclosure outreach should have been executed by a beneficiary or its authorized agent when new DTA requirements came into effect on July 22, 2011.[19] The Court should decline to review this argument as an issue of retroactive statutory amendment was not raised below.

Moreover, *unlike the Watsons*, Cabage "did learn about FFA mediation and a request to participate was made on her behalf," and actually participated in a formal mediation session. Brief of Appellant at 10.[20] Cabage did not like the eventual outcome of the mediation session she received, but that does not mean NWTS violated the DTA.

It is insincere for Cabage to suggest that NWTS must be held liable for not informing her of a process when *she nonetheless took full advantage of it* and was not prejudiced by the contents of any foreclosure notice. *Id.* at 10 ("Cabage participated as required under the FFA and

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[19] Division One did not consider the DTA provision which absolves a trustee of liability due to its reliance on the beneficiary's loss mitigation declaration. *See* RCW 61.24.031(2) ("Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the declaration as evidence that the requirements of this section have been satisfied, and the trustee is not liable for the beneficiary's or its authorized agent's failure to comply with the requirements of this section.").

[20] Also, unlike in *Watson*, the subject Property was not sold.

submitted all of the required documentation."); CP 1324, ¶ 7.[21]

The Court should hold that the Notice of Default issued in this case does not give rise to potential liability against NWTS.

vi. Other Cases Cited by Cabage are Not Helpful to this Litigation.

Cabage relies heavily on three recent appellate decisions that involve quite different facts and records than this case. Brief of Appellant at 32, *inter alia*, *citing Walker v. Quality Loan Serv. Corp.*, *supra.*; *Rucker v. Novastar Mortg., Inc.*, 177 Wn. App. 1, 311 P.3d 31 (2013); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013).

Walker accepted the borrower's allegations as true under CR 12(b)(6), which is different than reviewing a summary judgment. Because it accepted the plaintiff's hypothetical facts, *Walker* found a DTA violation due to an appointment of the trustee before "MERS purported to assign [the] note." 176 Wn. App. at 308. By contrast, nothing in the record here suggests non-party MERS' involvement, or that some entity besides the actual beneficiary asserted possession of the Note, attempted

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[21] Cabage also proclaims that she was "unfairly prevented... from having a meaningful FFA mediation and being properly reviewed for a loan modification," but *she did actually have mediation* and NWTS played no role in either PNC's decision-making or the mediator's certification. Brief of Appellant at 47; *see also* CP 440, 97:13-15 ("Q. Did you have any conversations with Northwest Trustee concerning your mediation with PNC? A. No.").

to effect transfer of the Note, or took actions in furtherance of foreclosure.

Walker does not address what constitutes an injurious material violation of the DTA, nor does it analyze the content of any foreclosure notices; rather, the limited analysis was premised entirely on the alleged unlawful appointment of the successor trustee. Indeed, the Notice of Default never made it into the record in *Walker*, "and it is unclear from the record which party mailed the notice to Walker." *Id.* at 303, n.2. Here, the evidence is quite different, and shows that NWTS caused the Notice of Default to be appropriately issued to Cabage due to her non-payment of the loan. CP 406-408.

Furthermore, *Walker* – and *Klem* as well – analyzed an earlier version of the DTA which *did not have a "beneficiary declaration" requirement*. *Id.* at 303 (Notice of Sale recorded July 21, 2009); *compare* 2009 Wash. Legis. Serv. Ch. 292 (S.B. 5810) § 8, eff. July 26, 2009. Thus, when the *Walker* Court agreed that a trustee was "obligated to have evidence... [to foreclose] on a legitimate and legal basis and not simply... [act] at the behest of a party that may or may not have the legal right to conduct such an action," the Court was unable to consider the effect of a beneficiary declaration as that evidence. *Walker*, *supra.* at 309. Once the beneficiary declaration provision was added to the DTA, trustees were

afforded a safe harbor to rely on the note holder's sworn statement of its status as sufficient proof under RCW 61.24.030(7). The Ninth Circuit Court of Appeals found that *Walker* and *Klem* "do not change the result" when a foreclosing entity "actually holds the note," which that Court described as "the bottom line." *Myers v. MERS et al.*, 2013 WL 4779758 (9th Cir. Sept. 9, 2013); *see also Mickelson v. Chase Home Fin. LLC*, 2014 WL 2750133 (9th Cir. June 18, 2014).

In *Rucker*, the Court found that "at the time that NovaStar appointed... [the] successor trustee, it did not hold the promissory note, having already conveyed the note to JPMorgan Chase and J.P. Morgan Trust as cotrustees of the Funding Trust." *Id.* at 14. Consequently, an inference arose "that NovaStar acted without direction from any lawful principal." *Id.* at 15, *citing Bain, supra.* at 107.

Furthermore, the borrowers were deemed to not have waived their right to challenge the completed sale because they "reasonably relied upon the representation of a [trustee] employee that the sale would not take place." *Id.* at 20.

Unlike *Rucker*, PNC was not foreclosing on a different Note holder's behalf. The bankruptcy court granted *PNC* relief from stay to "enforce its security interest in the Property...." CP 563-564. NWTS

received a sworn beneficiary declaration *from PNC* prior to recording either Notice of Trustee's Sale. CP 409, 410, 418. In addition, Cabage did not plead reliance on representations made by the trustee concerning the sale date. CP 1-20.

Finally, in *Bavand*, the Court could not identify the Note holder based on a limited record and the constraints of a CR 12(b)(6) standard of review. Division One observed that it did not have "any declaration or affidavit explaining more." 176 Wn. App. at 498. Here, multiple declarations from the beneficiary's representatives exist. CP 647-823 (Dec. of Justice), 1409-1419 (Dec. of Arthur), 1429-1434 (Dec. of Martin).

Even if Cabage is correct and the trial court "ignored" *Walker*, *Rucker*, and *Bavand*, it would have done so with good reason. Brief of Appellant at 32. There are clear distinctions between the evidence below and the record presented in each of those matters.

In sum, there was no error below for NWTS to have received summary judgment on the question of material compliance with the DTA.

3. Cabage's Claim of CPA Violations.

A violation of the CPA requires:

(1) an unfair or deceptive act or practice, (2) occurring in trade or

commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

a. There Was No Unfair or Deceptive Practice Affecting the Public.

CPA liability requires an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), *quoting Hangman Ridge*, *supra*; *see also* RCW 19.86.093.

"Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006). An "act performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Leingang v. Pierce Co. Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997).

Here, Cabage did not allege a *per se* CPA violation, so the only method by which she could establish a CPA violation is to show that NWTS engaged in conduct with a capacity to deceive a substantial portion of the public. *See Saunders, supra.* at 344, *quoting Hangman Ridge* at 785. But Cabage could not articulate *anything* inaccurate about the November 2011 Notice of Trustee's Sale. CP 435, 49:23 – 436, 50:2.

In fact, Cabage was unable to articulate *anything* about NWTS' actions that might have deceived the general public beyond the bare conclusion that "other Washington homeowners" were affected by similar purported misrepresentations. CP 15, ¶ 3.9; *see also* CP 1321-1357 (Dec. of Cabage contains no mention of effect on the public). Cabage was incapable of establishing the first prong of the CPA test, let alone the remaining elements.[22]

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[22] The trial court found that *Bain* led to questions of material fact on the "unfair or deceptive act" and "public interest" prongs, but nothing in that decision, or any case in Washington, holds that these elements of a CPA claim are automatically satisfied against a non-judicial foreclosure trustee. CP 1610; *but see Coble v. SunTrust Mortgage, Inc. et al.*, 2014 WL 631206, *4 (W.D. Wash. Feb. 18, 2014); *Estribor v. Mtn. States Mtg.*, 2013 WL 6499535, *6 (W.D. Wash. Dec. 11, 2013) ("[t]he deed of trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive."); *Lynott v. MERS*, 2012 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("*Bain* did not... create a per se cause-of-action based solely on MERS's involvement."). According to *Bain*, any question would relate to MERS's actions (whatever they may have been), and not those of NWTS.

b. There Was No Public Interest Impact.

"The public interest in a private dispute is not inherent." *Tran v. Bank of America*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013), *citing Hangman Ridge*, *supra.* at 790; *see also Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement); *but see Bain* at 118 (there is "*considerable evidence* that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as *half nationwide*.") (emphasis added). As the Hon. Judge Lasnik stated in *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013), "[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong."

Each of the alleged acts Cabage claimed exclusively relate to conduct directed at her personally, *i.e.*, whether NWTS had authority to commence foreclosure of the subject Property. These acts did not, and could not, have the capacity to deceive other individuals, let alone a substantial portion of the general public. As such, Cabage did not present evidence to

create a genuine issue on the second prong of the CPA test either.[23]

c. NWTS Did Not Cause Injury to Cabage.

Finally, a CPA claim must plead and prove that there is a causal link between the alleged misrepresentation or deceptive practice *and* the purported injury. *Hangman Ridge, supra.* at 793. A plaintiff must demonstrate that the "injury complained of... would not have happened" if not for defendant's acts. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007).

An award under the CPA is strictly limited to damage "in... business or property...." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). Lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993); *see also Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (tort recovery is barred where damages are purely economic losses based on a contract).

As the Ninth Circuit Court of Appeals recently held concerning a CPA claim in the foreclosure context:

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[23] *See* n. 20, *supra.*

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mtg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).

Likewise, Cabage did not identify an injury that was proximately caused by NWTS' conduct. *Cf. Demopolis v. Galvin,* 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* a CPA "injury"); *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309, *8 (W.D. Wash. Dec. 23, 2013) (a "laundry list... including attorney fees, 'wear and tear' on [a] vehicle, and buying... stamps, is inapposite.").[24]

Moreover, the proximate cause of any purported "harm" to Cabage was her own default, not NWTS's fulfillment of its duties. *See Massey, supra.* at *8, *citing Babrauskas v. Paramount Equity Mtg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure); *McCrorey, supra.* (plaintiffs' failure to pay led to foreclosure); *Reid v. Countrywide Bank, N.A.*, 2013 WL 7801758, *5 (W.D. Wash. Apr. 3, 2013) (alleged deception in

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[24] *See also Thurman v. Wells Fargo Home Mortgage*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013), *citing Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property.").

making payments to "parties who are not the true holders and owners of the Note" suggested no basis for injury).

It was the actions of Cabage, and not NWTS, that gave rise to the initiation of foreclosure – and she openly admits this point:

> Q. [D]id you understand that when you got this loan originally in 2006 that if payments weren't made on the loan that the property could get foreclosed on?
> A. Yeah, I did understand that.
> Q. Did Northwest Trustee cause you to stop making payments on the loan?
> A. No, they did not.
> Q. Did Northwest Trustee have any involvement in the fact that the loan was delinquent or in default?
> A. No, they did not.
> Q. Did Northwest Trustee have any involvement in your pursuit of a loan modification?
> A. I don't believe so.
> [...]
>
> Q. Would you agree that the fact that the loan was in arrears or delinquent is what caused foreclosure notices to be posted in the first place?
> A. Sure, that's probably what happened.[25]

CP 616, 104:2-14; CP 617, 105:10-15.

Cabage offered nothing to demonstrate that, because of NWTS's conduct, she suffered injuries merely as a result of receiving foreclosure

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[25] (This response made subject to legal conclusion objection by Cabage's counsel.)

notices due to her failure to pay the secured loan.[26] Therefore, the trial court correctly granted summary judgment to NWTS on this basis. CP 1610-1612.[27]

4. Cabage's Claim of Intentional and/or Negligent Misrepresentations.[28]

To prevail on a claim for negligent misrepresentation, a plaintiff must prove by *clear, cogent and convincing evidence* that (1) a defendant provided false information for his guidance in a business transaction; (2) a defendant knew or should have known that the information was supplied to guide plaintiff in that transaction; (3) a defendant was negligent in obtaining or communicating the false information; (4) plaintiff relied on a defendant's false information; (5) plaintiff's reliance was reasonable; and (6) the false information was the proximate cause of plaintiff's damages.

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[26] Indeed, if the pursuit of non-judicial foreclosure was to serve as grounds for damages to plaintiffs who may experience "emotional distress" or the necessity of moving because of their own default, then *every* non-judicial foreclosure in Washington State could give rise to CPA liability. Cabage may wish to see this outcome, but it lacks legal authority. *Accord McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 233 P.3d 861 (2010) (a deed of trust creates an agreement between the parties executing it).

[27] ("The Court, having parsed the record thoroughly, finds no damages sustained as a result of the allegedly deceptive actions of PNC in twice attempting nonjudicial foreclosure of Ms. Cabage's residence.")

[28] Cabage's Statement of Issues draws no distinction between her joint cause of action for "Intentional and/or Negligent Misrepresentations." Brief of Appellant at 4; *see also* CP 18. She also seemingly limits the scope of review to strictly the question of "damages," although she argues multiple elements of the claim(s) were met. *Compare* Brief of Appellant at 4, 47-50.

Ross v. Kirner, 162 Wn.2d 493, 172 P.3d 701 (2007), citing *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002). "A party claiming negligent misrepresentation must prove it justifiably relied upon the information negligently supplied [by a defendant]." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998).

Promises of future performance "may support a contract claim (or similar claim such as promissory estoppel in an appropriate case), [but] failure to perform them cannot alone establish the requisite negligence for negligent misrepresentation." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 876 P.2d 435 (1994), *citing High Country Movin', Inc. v. U.S. West Direct Co.*, 839 P.2d 469 (Colo. Ct. App. 1992); *see also Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 40 P.3d 1206 (2002). "This is because of the absence of any false representation as to a presently existing fact, a prerequisite to a misrepresentation claim." *Id.*

An *even higher standard* applies to Cabage's concurrent theory of intentional misrepresentation, *i.e.*, fraud. *See W. Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 48 P.3d 997 (2002). Under CR 9(b), "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Washington law requires clear

and convincing evidence of nine elements to show fraud:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 504, 925 P.2d 194 (1996).

The Ninth Circuit Court of Appeals has analyzed the parallel federal rule in the context of a multi-party lawsuit, holding that:

> [when] the complaint accuses several defendants of participating in an allegedly fraudulent scheme, [F.R.C.P.] 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.

Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (citations and quotations omitted); *see also In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547, 1548 (9th Cir. 1994).[29]

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[29] The Ninth Circuit, in *Glenfed*, states:

> To allege fraud with particularity, a plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. A plaintiff might do less and still identify the statement complained of; indeed, the plaintiff might do less and still set forth some of the circumstances of the fraud. But the plaintiff cannot do anything less and still comply with *Rule 9(b)*'s mandate to set forth with particularity those circumstances which *constitute* the fraud.

Id. at 1548 (emphasis in original).

Here, Cabage's Complaint expressed that all "Defendants" should be liable for "intentionally misrepresenting the identities of the true Note holder and its ability to foreclose...," including their "various relationships to Ms. Cabage's mortgage loan," but none of the allegations themselves are pled with particularity or substantiate the aforementioned elements. *See* CP 19, ¶¶ 3.18-3.19.

Additionally, in Cabage's deposition, she testified that the so-called "misrepresentations" of NWTS consisted of issuing different notices of sale at different times. CP 614, 102:2-12. But Cabage did nothing in reliance on the notices. In fact, Cabage moved out of the Property before she received any notice from NWTS. CP 432, 40:17-20; CP 433, 44:8-11. Cabage recognized that "when I'm told that my house is going to be foreclosed on, that means I'm not going to own it anymore and I don't have a right to live there." CP 615, 103:24-25 – 616, 104:1; *see also* CP 590:23-25 – 592:9. Cabage also admitted that none of the information in the notices was false. CP 429, 27:5-21 – CP 430:3; CP 434, 47:6-9; CP 436, 49:23-24 – CP 437, 50:2; CP 438, 52:1-6; CP 442, 101:2-13.

Stating in bold type that Cabage has "proven NWTS intentionally made false representations about the identity of the 'beneficiary' and the

loan owner..." does not make it so. Brief of Appellant at 40 (emphasis omitted). Given a failure of requisite proof, the trial court did not err in dismissing Cabage's Misrepresentation claim(s).

B. NWTS Should be Awarded Costs Upon Prevailing.

"A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." R.A.P. 14.2. Certain expenses are allowed as awardable costs, including the cost of reproducing briefs. R.A.P. 14.3(a). These expenses also include a $200 statutory attorneys' fee. RCW 4.84.080.

Here, NWTS requests a cost award resulting from a decision to uphold the trial court's order.

IV. CONCLUSION

The record in this case demonstrates certain key facts: 1) Cabage signed the Note and secured its repayment with the Deed of Trust naming the Property as collateral (CP 482-507), 2) Cabage agreed in the Note that if she did not "pay the full amount of each monthly payment on the date it is due," she would be in default (CP 484, ¶ 7(B)), 3) Cabage also agreed that the Note and Deed of Trust could be sold one or more times without notice to her (CP 499, ¶ 20), 4) Cabage knew that National City was the

secured creditor with respect to the secured loan when she filed bankruptcy (CP 527), 5) PNC, as successor by merger to National City, obtained relief from the bankruptcy stay to enforce the Deed of Trust because of Cabage's default (CP 563-564), 6) NWTS issued all required notices under the DTA (CP 402-423), 7) Cabage properly participated in FFA mediation with PNC, but was unsuccessful at negotiating a change in the loan terms (CP 823), and 8) NWTS discontinued the non-judicial foreclosure process (CP 404, ¶ 7).

Cabage knew precisely both who to pay and who had authority to both modify and enforce her obligation. The totality of Cabage's allegations in this case disagreed with PNC's authority as the beneficiary, yet they conspicuously downplayed Cabage's default since May 2009 and her agreement that foreclosure was a proper remedy.

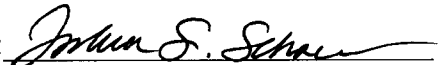
Throughout Cabage's Opening Brief, she concludes that NWTS "knew" that PNC was not the beneficiary or that PNC made false statements – *but not once does she explain how this was true.* Brief of Appellant at 6 ("this fact was known to... NWTS..."), 14 ("NWTS knew it [the beneficiary declaration] to be untrue."), 28 ("NWTS knew that PNC was not the noteholder..."), 33 ("NWTS knew that PNC was not the beneficiary..."), 34 ("NWTS and its affiliated law firm RCO knew about

the false assertions...").[30] It bears repeating that "[u]nsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment." *See Vacova Co., supra.* at 395

The trial court's ruling should be affirmed because Cabage's claims were insufficient to advance genuine issues of fact and overcome the evidence PNC and NWTS presented.

DATED this 8th day of July, 2014.

RCO LEGAL, P.S.

By: 
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent
Northwest Trustee Services, Inc.

[30] Apparently, Cabage imputes some form of knowledge to NWTS because of its choice of counsel, but provides no authority for this proposition. *Cf. Mickelson v. Chase Home Fin. LLC, supra.* (finding no DTA or CPA liability; "[t]he Mickelsons offer no evidence that NWTS shares any obligation that Routh Crabtree Olsen, P.S. ('RCO') might owe the beneficiary in its capacity as legal counsel to Chase [the beneficiary].").

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

SANDRA CABAGE, Appellant, v. NORTHWEST TRUSTEE SERVICES, INC., PNC MORTGAGE, a division of PNC BANK, N.A and DOE DEFENDANTS 1 through 20, Respondents.	No. 45953-1-II **DECLARATION OF SERVICE**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on July 10, 2014, I caused a copy of **Respondent Northwest Trustee Services, Inc.'s Opening Brief** to be served to the following in the manner noted below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 10th day of July, 2014.

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